Sacramento Theatrical Lighting *and* Local 50, International Alliance of Theatrical Stage Employees, AFL–CIO. Case 20–CA–28347–2

February 14, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On June 10, 1999, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Jonathan J. Seagle, for the General Counsel.
Dennis R. Murphy and *John A. Bachman (Diepenbrock, Wulff, Plant & Hannegan)*, of Sacramento, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Sacramento, California, on August 18, 1998. The charge was filed on March 3, 1998, by Local 50, International Alliance of Theatrical Stage Employees, AFL–CIO (the Union or IATSE). The complaint was issued on June 16, 1998, by the Acting Regional Director for Region 20 of the National Labor Relations Board, and amended at the hearing. As amended it alleges that the Respondent, Sacramento Theatrical Lighting, violated Section 8(a)(1) of the National Labor Relations Act (the Act or the NLRA) in the manner in which it treated a sympathy striker, Michael Pulskamp, after a strike was over. Respondent denies the commission of any unfair labor practices.

The Issue

The principal issue is whether Respondent had any duty to offer reinstatement to Michael Pulskamp after the Union ended its strike on January 16, 1998. There is no evidence that Pulskamp, or anyone authorized by him, unconditionally asked for his reinstatement. Indeed, the parties are in virtual agreement over that fact. Counsel for the General Counsel argues, however, that the fact pattern leads to the conclusion that an offer was unnecessary; Respondent disagrees, asserting that neither it nor Pulskamp said or did anything to warrant departure from the standard rule. Moreover, it asserts that Pulskamp, at the time he became a sympathy striker, was a Section 2(11) supervisor and not subject to the protection of the Act. Based on the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged in the business of assembling and installing props, stages, and lighting and other equipment for stage shows, conventions, and trade shows (as well as repairing and refurbishing that equipment) in and around Sacramento, California. It has a headquarters and warehouse facility in that city, although most of its work is performed at other venues in the area, including the Cal Expo state fairgrounds, the ARCO Arena, and the Sacramento Community Center. In the course of that business, it annually purchases and receives goods directly from sources outside California valued in excess of $50,000. Accordingly, it admits it is, and I find it to be, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; it also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent's business is split into two departments, the theatrical department and the conventions and expositions department. We are concerned only with the latter, run by Cheryl Cox, the department manager and corporate secretary-treasurer. This department is also split. It employs persons who work full time in the warehouse, including one to three electricians. None of these individuals is represented by IATSE. However, it does have a collective-bargaining relationship with that Union allowing it to call for short-term employees who are to deliver equipment and to perform electrical work for the so-called "shows" at Cal Expo, ARCO, and the Convention Center venues covered by the collective-bargaining contract. Both the past and current collective-bargaining agreement specifically allow(ed) Respondent to send up to five of its own employees to the convention/show site to perform show work, including the work of the head electrician. The contract specifically excludes those five persons from its coverage (and therefore from the bargaining unit).

Pulskamp was hired as the head electrician for the warehouse in December 1994. About 16 months later, Respondent hired Steve Lawrence as the assistant head electrician in the warehouse. Pulskamp trained Lawrence and by late 1997, the two had become very good at the job; while Pulskamp was the head electrician in the field, overseeing the union dispatchees at about three-quarters of the shows, Lawrence served that capacity for the remaining quarter.

[1] Since we are adopting the judge's recommended Order and dismissing the complaint, we find it unnecessary to resolve the following issues raised by the judge in his decision, but not "definitively answer[ed]" by him: whether alleged discriminatee Michael Pulskamp was a statutory supervisor or managerial employee; whether Steve Lawrence permanently replaced Pulskamp when the Respondent appointed him head electrician; and whether the Respondent was obligated to fill the position of second assistant electrical technician upon its termination of assistant electrical technician Jesse Jimenez.

In the spring of 1997, the IATSE collective-bargaining contract expired and was in the process of being renegotiated. On April 30, 1997, the Union's recording secretary wrote Respondent's president, John Cox, accusing him of bad-faith bargaining and advising that beginning May 5, the Union would not honor referral requests for employees from its hiring hall until a new agreement was reached.

Respondent had foreseen that eventuality and had arranged with some temporary agencies to supply the necessary labor. These individuals were overseen by either Pulskamp or Lawrence. One of the persons so dispatched was Jesse Jimenez, who worked primarily as a warehouseman in the freight division, but was called on to assist at the shows. On October 27, 1997, based on input from Pulskamp, Cheryl Cox decided to hire Jimenez as one of Respondent's own employees. He was not really considered to be an electrician, but was expected to do some of that type of work. He was also to do other things in the warehouse, mostly connected to freight. Three days later, on October 30, 1997, the Union established the first picket line at Respondent's offices and warehouse. On that day, Pulskamp decided to honor the IATSE picket line and did not report for work during the period of the picketing.

On October 31, 1997, Cheryl Cox wrote Pulskamp a letter observing that he had refused to cross the picket line, recognizing that his refusal was protected by law. It went on to advise Pulskamp that Lawrence was being given Pulskamp's job on a "full-time regular basis." The letter further advised him that Jimenez had been promoted to Lawrence's previous job, "the assistant electrical technician" (assistant head electrician). Cox went on to say the Company did not feel it necessary to fill Jimenez' previous job, but if they decided to do so, Pulskamp would be offered that job.[1]

On January 16, 1998, Respondent and the Union entered into an Interim Collective-Bargaining Contract and Local 50 once again began dispatching employees to Respondent's convention shows on appropriate requests. The picketing was discontinued at the warehouse/office facility.

On January 25–29, 1998, the Union referred Pulskamp to Respondent's show for the California League of Food Processors convention, short-term employment.

On January 26 or 27, Cheryl Cox learned that Jimenez could not read the layouts independently and notified him that he was to be terminated on January 30. The termination took place as scheduled. Respondent simultaneously determined that it would not fill the assistant head electrician job. Cox testified that Lawrence's skills were so great, and with a seasonal slowdown that lasted until late July, they were able to make do with Lawrence alone, although on a few occasions they took a referral from the IATSE hiring hall to perform the assistant's work.

In the meantime, Pulskamp continued to be referred to Respondent's shows on a short-term basis as an electrician. From January 29-February he worked at the Northern California Home and Landscape Expo; on March 7–8 he worked the California Optometric Expo; on March 9, the Government Conference on the Environment; and on March 13–14, the Sacramento Bee Travel Fair. It appears the Union referred him to other employers as well.

In the meantime, on February 27, 1998, the Union filed its first unfair labor practice charge with Region 20 of the NLRB alleging that Respondent had refused to rehire Pulskamp after he had allegedly made an unconditional offer to return to work. That charge was later withdrawn, and the instant charge substituted on March 3. On March 27, Respondent and the Union entered into the current collective-bargaining contract.

Eventually, on July 20, Cheryl Cox decided to fill the assistant's job. She wrote a letter that day offering the job to Pulskamp. He accepted by letter delivered on July 28, arranged a short delay in returning, and began work on August 3.

When Pulskamp was dispatched to various shows after the strike ended, on at least one occasion he spoke to Company President John Cox. That conversation was social in nature. At no time did Pulskamp ask to return to his old job or to any full time job in the warehouse. His testimony:

> Q. [By Mr. Seagle] Did you have any discussion with [John Cox] concerning returning to work for Respondent on a regular basis?
>
> A. No.

Pulskamp also was discussed on at least two occasions during the latter stages of negotiations. Union President Larry Stanfill testified that in late January, at a negotiation session, Pulskamp's name was discussed in the context of a claim that Pulskamp had been fired. He says Company attorney Dennis Murphy asserted that was not so, that Pulskamp had been laid off and had the potential of being recalled.[2]

On February 3, according to Stanfill, as the parties could see an agreement coming, Murphy asked Stanfill if the unfair labor practices would be dropped. Stanfill said that they would be except for the one regarding Pulskamp. Stanfill saw no need for the Union to ask for Pulskamp's reinstatement. He said:

> Q. [By Mr. Seagle] Did you say anything at that meeting concerning Mr. Pulskamp's willingness to come back to work?
>
> A. Yes. Because I think Mr. Murphy was the one who said that Mr. Pulskamp had not said that he was willing to come back to work, had not called them. And I stated that in the—that it was my feeling that since the Employer was going to be the one to decide whether the position was open or not it was incumbent upon them to offer the position to Mr. Pulskamp, that we wasn't the one that needed to contact them.

It is apparent that the Union did not understand that Pulskamp's return to work fell under the rules relating to strikers, not under

[1] There is no dispute that the "third" job held only by Jimenez and for only 3 days is not substantially equivalent to either the "head" job or the "assistant head" job. The duties were not skilled and the pay rate was substantially less.

[2] If Murphy said that Pulskamp had been laid off, a circumstance which I tend to doubt, the remark referred to his payroll status, not his having become disconnected to Respondent in a manner which would implicate Sec. 8(a)(3). In fact Pulskamp was simply considered a striker who had not yet informed the Company of his desire to return to work. Layoff in that context simply means that he was not currently working.

those concerning discharges. As a result of both Pulskamp's own testimony, and the Union's belief that it had no responsibility to Pulskamp as a striker, the conclusion is inescapable that Pulskamp did not, after the IATSE strike ended, ever make a request of any kind that he be reinstated, either to his old job or to any other job.

III. ANALYSIS

Since Pulskamp was a striker, albeit a sympathy striker, his circumstances must be analyzed as those of a striker who wants to return to work. It has long been a fundamental requirement that a striker who wishes to return must somehow convey his intentions to the employer, whether the strike is over or not. That is true whether the striker is an economic striker, as Pulskamp was here, or whether the striker is an unfair labor practice striker, one who is protesting an employer's unfair labor practices or one whose economic strike has been caused or prolonged by the employer's unfair labor practices.

The striker must somehow advise the employer that he is now ready to cease withholding labor and is ready to return to work. It is at that point that the striker's rights become defined, no matter what type of striker he is. When the striker does so, the employer must make a decision, either accept the striker's offer to return to work or whether to decline it for some reason. It is the employer's decision to decline to put the striker back to work which triggers questions of discrimination under Section 8(a)(3), or in this case, Section 8(a)(1). Most cases do not concern themselves with the issue of whether or not the striker has asked to return. Usually the striking union does that for them, and the vast majority of cases focus on what the employer's response was. The focal point of the leading case on the subject is the employer's response, but nonetheless that case continued to impose the duty on the employee to advise the employer that he wants to return to work. See *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), where the Board said:

> economic *strikers who unconditionally apply for reinstatement* when their positions are filled by permanent replacements (1) remain employees; (2) are entitled to full reinstatement upon departure of replacements or when jobs for which they are qualified become available, unless they have in the meantime acquired regular and substantially equivalent employment or the employer can sustain its burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons. [171 NLRB at 1369–1370.] [Emphasis added.]

The Italicized portion of the quotation is our concern here. Indeed, that requirement was even part of the earlier rule governing the reinstatement of strikers. See the Supreme Court's decisions in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), and *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).[3] When the Board adopted the *Laidlaw* rule with respect to strikers' rights, it did not modify the requirement that the striker set the predicate for returning by asking to come back to work. If such a request was not made, the employer could not know of the striker's desire to return and if he could not know, both the Board and the courts felt the employer should not be liable for backpay. Not everyone who goes on strike chooses to return. Many abandon that job in favor of what they perceive to be a better one; others have career changing events during the strike which require that they go somewhere else or do something else. For that reason, the struck employer is entitled to accurate knowledge about a striker's intentions.

In fact, for a long time, and for the same reason, even strikers who were discharged while on strike were obligated to ask unconditionally for reinstatement, unlike nonstriking discriminatees. See *Valley Oil*, 210 NLRB 370 (1974). That rule was changed in 1979 when the Board decided *Abilities & Goodwill*.[4] Of course, there is no claim here that Pulskamp is a discharged striker. I mention the old rule simply to make the point that strikers have long been subject to the duty to advise their employer regarding their intention to return to work.

There is one exception to the requirement that the striker must offer to return, the so-called futility exception. In some circumstances the Board has held that the striker's duty to advise the employer of his intent to return has been excused when the employer has done something so severe as to mislead a striker into thinking he could not return after the strike no matter what he did. See for example *Moore Business Forms*, 224 NLRB 393 (1976). No such contention has been made here.

Counsel for the General Counsel, however, sees another reason to excuse Pulskamp from having to ask to return to work. He observes that after the strike was over, and after the Union resumed referring employees to Respondent for show work, it referred Pulskamp to Respondent to work in that capacity and Respondent accepted him to perform that type of work. From that, the General Counsel argues, Respondent, particularly John Cox, knew that Pulskamp wanted to return and therefore Pulskamp was excused from having to actually tell one of the Coxes that he wanted to come back. In this regard, the General Counsel cites *Sunbeam Lighting Co.*, 136 NLRB 1248 (1962), as support for the argument.

In fact, however, *Sunbeam* does not provide support for the General Counsel's argument. In that case, the day after the employees struck, a large number of them appeared at the plant at starting time ready to go to work. They were turned away by the plant superintendent who told them they were in the process of being fired. The Board held that their appearance at the gate ready to go work, together with what the plant superintendent had said to them, warranted the conclusion that they in fact had offered to return to work and that the duty had been satisfied. Nothing like that occurred here and I do not find *Sunbeam* helpful, much less controlling. It is simply a case where the strikers did ask to go back to work.

In any event, I am unable to agree with the General Counsel that Pulskamp was excused from telling Respondent that he was ready to go back to work. Pulskamp's acceptance of short-

[3] "An employer may not retaliate against striking employees by refusing to reinstate them *upon their unconditional offers to return to work*; such retaliation would discourage employees from exercising their guaranteed rights to organize and strike." *Fleetwood Trailer*, supra at 378. (Emphasis added.)

[4] 241 NLRB 27 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979)

term work signifies nothing insofar as returning to his permanent job is concerned. Indeed, when he said nothing about his intentions to John Cox, Cox was well within his rights to assume Pulskamp was happy working through the union hiring hall. The acceptance of short-term work through the hiring hall certainly does not logically lead to the General Counsel's conclusion, that Pulskamp wanted his old job back. As a result, I must conclude that Pulskamp did not take the steps necessary to invoke the *Laidlaw* striker protection rule. Since he never asked to return to work, Respondent has never denied him the right to do so. The complaint will be dismissed on that basis.

This conclusion obviates the necessity of looking at other possible issues. One is whether or not Pulskamp was a statutory supervisor and not subject to the Act's protections at all. *Parker-Robb Chevrolet*, 262 NLRB 402 (1982). Another is whether he was actually permanently replaced by his subordinate, Lawrence.

Without definitively answering those questions, I think that there is a substantial likelihood that Pulskamp, at the time he chose to go on strike, was a statutory supervisor. He wanted to deny the authority, but the fact is, whenever he took charge of a show, particularly the larger ones, if he wasn't the supervisor, then large crews (for the Tony's show a crew of 25 was required) would be unsupervised, an unlikely circumstance. Moreover, Pulskamp, as the head electrician, had administrative duties (planning and estimating overhead needs) which suggest that even if he is not a supervisor, he was a managerial employee, also not protected by the Act.

The next issue, whether Lawrence permanently replaced Pulskamp becomes necessary to decide only if Pulskamp was a statutory employee who had asked to return at the end of the strike. Here, although I think Cheryl Cox's letter of October 31 is somewhat ambiguous and susceptible to more than one interpretation, Pulskamp never said he wanted to return. Therefore, it is unnecessary to resolve that ambiguity.

There is also the possible question of whether or not when Respondent let Jimenez go, it was obligated to immediately fill the slot of the second electrician. Suffice it to say, that there is no evidence that Respondent chose not to fill that job immediately for any reason other than financial. It simply did not have enough work available to justify keeping that post filled until work increased in July. At that time it reached out to Pulskamp and offered him the second electrician's job. The General Counsel does not attack that decision, even in light of the ambiguity found in Cox's letter, perhaps conceding that Lawrence did permanently replace Pulskamp as the head electrician.

Accordingly, the complaint will be dismissed.

Based on the foregoing findings of fact and analysis, I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (5), and (6) of the Act.

2. Local 50, International Alliance of Theatrical Stage Employees, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent's employee Michael Pulskamp became a sympathy striker on October 30, 1997.

4. Pulskamp, since the date he became a striker, has never offered to return to work at the job he held prior to the strike or to any other substantially equivalent job.

5. The General Counsel has failed to prove the elements of a prima facie case that Respondent has discriminated against Pulskamp by not recalling him to a permanent position after the end of the strike.

6. The General Counsel has failed to prove that Respondent violated Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint is dismissed.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.